

C O P Y \*OGC Has Reviewed\*

By Decree of the Bundesgerichtshof (Federal Court) of 16 February 1954, file No. 1 Str 578/53, the following is established:

Law: Basic Law Art. 1, Para. 136a, 81a of the Code of Criminal Procedure

Syllabus: The examination with the "Polygraph" (lie detector) violates the freedom of decision and freedom of manifestation of will of the accused and, therefore, is not permissible in criminal prosecutions nor preliminary investigations, regardless of the consent (of the accused).

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Attached is the case 1 Str 578/53, tried by the 1st Criminal Senate of the Bundesgerichtshof (Federal Court) on 16 February 1954, with Bundes Judge Dr. ESTE presiding, whereby, upon appeal by the defendant against the sentence of the District Court in ZWILIBRUSCHEN of 11 June 1953, the verdict was set aside and the case was assigned for new trial to the District Court in KAISERSLAUTERN.

As the basis for this decision the following is set forth :

The defendant is accused of having embezzled from the RAIFFEISENKASSE in ALTENKIRCHEN - for whom he worked as a bookkeeper - the amount of 5760 DM and of having faked a burglary of the safe to cover up his crime. He was sentenced for disloyalty (embezzlement) in conjunction with faking a penal action (Para. 145 of the Criminal Code).

His appeal from the sentence resulted in its being set aside and reassignment of the case.

"The admission of the answers of the accused during the examination by 'Polygraph' and the admission of the recordings of

this apparatus as evidence was, irrespective of his consent thereto, not permissible according to Art. 1, Sec. 1 of the Basic Law and Para. 136a of the Code of Criminal Procedure."

"The admissibility does not depend upon the usability of the Polygraph to clear up criminal actions, and it also does not depend upon the correctness and reliability of scientific considerations, on which it is based. It is to be considered solely in the light of principles regulating criminal proceedings; and these principles forbid the use of the apparatus:

1. "Dignity of man cannot be touched. To respect and protect it is the obligation of all State Power" (Art. 1 Sec. 1 of the Basic Law). That maxim of the Basic Law, without restriction, applies also to a person suspected of a criminal act. In its meaning it is contained in Art. 2, 104 Sec. 1 of the Basic Law and in the Regulation of Para. 136a, 69 Sec. 3, 81c, 161 Sec. 2 and 163 Sec. 2 of the Code of Criminal Procedure.

Exploration of truth should be performed exclusively in these ways, and by methods established by other regulations.

The freedom of decision of the accused remains unrestricted according to the law. He does not have to cooperate concerning the investigation of facts. (BGHSt. 1.)

- a. The provisions of Para. 136 of the Code of Criminal Procedure emphasized this principle. At the beginning of the trial, the accused is to be asked whether he wants to reply to the accusations (Para. 243, Sec. 3, 136 StPO). It is accordingly left

up to him during the interrogation to decide whether and how he will answer a question, without unconscious replies of his personality appearing. When examined by the Polygraph, that is no longer up to him. The machine is reputed to register blood pressure, pulse and duration of breathing which are closely connected with the psychological conditions of the accused during the examination. To the psychologist who operates the machine, that indicates whether the questioned person is tense or not. If one, contrary to scientific recognitions, considers this machine correct, then the following is established: The accused cannot evasively, falsely or correctly answer any questions without having unconscious physical reactions registered and interpreted by the specialist. The Polygraph thus has the purpose of obtaining from the accused more and different statements than during a customary hearing, among them such statements which he makes against his will and which he cannot make without the machine. The sub-conscious also replies to the questions. Such an insight into the soul of the accused violates the Freedom of Decision and Manifestation of Will and is not admissible.

b. The District Court also cannot base its verdict on Para. 81a of the Code of Criminal Procedure. The regulations regulate the physical search of the accused, but it is to serve only to find facts which are of importance to the trial. That provision refers to the physical condition of the accused, including strange objects in him, and also his behavior towards outside influences (alcohol).

2. In addition to that, there are further legal questions:

a. The scientific bases of the examination by Polygraph and the reliability of the test results are presently uncertain. The District Court assumes that "an increase of heart activity and breathing" appears, if the accused willingly lies. That expression is not clear. Furthermore, it is known that such a thesis is not undisputed in science. That it is undisputed is essential for using scientific examination methods (compare HRRot 5, 34). The District Court did not obtain certainty in that respect. It assumes that "German authors" did not have any experiences with that apparatus and gives the explanation that "according to American experts, the examination is a suitable method to find truth beyond a doubt". That does not appear to be the case insofar as English and American court practice, in contrast to police investigations, is concerned. (Compare HIGDON, On Evidence, 1940, para. 999 and attachment 1949, para. 999) Still less does it apply to German law. SCHLIER, which the District Court quotes, on the contrary, was of the opinion that the machine worked "more without mistakes than in the Association method", if the accused was innocent and did not know the charges against him. But when the accused was examined, the charges were known to him.

b. The District Court furthermore did not obtain any certainty concerning the evaluation, although it is known that a special training is needed for that. It accepted the information of the investigating American persons, that they had this training,

without examining that and without hearing these persons at the trial.

c. Finally, it was not ascertained whether technical mistakes might not have influenced the machine.

The new trial will give the District Court the opportunity to consider the further questions mentioned in this appeal, and which are not without weight.

Objectively, the sentence cannot legally be criticized.

The Decree corresponds with the application of the (ber-bundesanwalt. The local State Attorney had applied for examination through Polygraph after the agreement of the accused.

It appeared advisable to the Senate to make use of the Law in accordance with Para. 354, Sec. 2 of the Code of Criminal Procedure.